Supreme Court, U.S.
FILED
JUN - 5 2015
OFFICE OF THE CLERK

No. 14-462

IN THE

Supreme Court of the United States

DIRECTV, INC.,

Petitioner,

v.

AMY IMBURGIA, ET AL.,

Respondents.

ON WRIT OF CERTIORARI TO
THE CALIFORNIA COURT OF APPEAL,
SECOND DISTRICT

BRIEF OF AMICUS CURIAE NEW ENGLAND LEGAL FOUNDATION IN SUPPORT OF PETITIONER

Counsel for Amicus Curiae

Benjamin G. Robbins
Counsel of Record
Martin J. Newhouse, President
New England Legal Foundation
150 Lincoln Street
Boston, Massachusetts 02111-2504
(617) 695-3660
benrobbins@nelfonline.org

Dated: June 5, 2015

BATEMAN & SLADE, INC. BOSTON, MASSACHUSETTS

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

INTEREST OF AMICUS CURIAE 1

SUMMARY OF ARGUMENT 2

ARGUMENT 4

THE PRE-*CONCEPCION* ARBITRATION AGREEMENT AT ISSUE DOES NOT INDICATE AN INTENT TO DISPLACE THE FEDERAL ARBITRATION ACT BECAUSE THE FAA WAS UNDERSTOOD AT THAT TIME TO DEFER TO STATE CONTRACT LAW ON THE ISSUE OF CLASS ARBITRATION WAIVERS. 4

CONCLUSION 11

TABLE OF AUTHORITIES

CASES

AT&T Mobility LLC v. Concepcion,
131 S. Ct. 1740 (2011) ..... *passim*

Green Tree Fin. Corp. v. Bazzle,
539 U.S. 444 (2003) 9

Imburgia v. DIRECTV, Inc.,
170 Cal. Rptr. 3d 190 (Cal. Ct. App. 2014) 5, 6, 8

Kinkel v. Cingular Wireless LLC,
857 N.E.2d 250 (Ill. 2006) 7

Scott v. Cingular Wireless,
161 P.3d 1000 (Wash. 2007) 7

Shroyer v. New Cingular Wireless Servs., Inc.,
498 F.3d 976 (9th Cir. 2007) 6

Stolt–Nielsen S.A. v. AnimalFeeds Int'l Corp.,
559 U.S. 662 (2010) 9, 10

Ting v. AT&T,
319 F.3d 1126 (9th Cir. 2003) 7

STATUTES

9 U.S.C. §§ 1-16 ..... 1, 2, 4

9 U.S.C. § 2 ..... *passim*

OTHER AUTHORITIES

Christopher R. Drahozal & Quentin R. Wittrock, *Franchising, Arbitration, and the Future of the Class Action*, 3 Entrepreneurial Bus. L.J. 275 (2009) 8

Theodore Eisenberg, Geoffrey P. Miller & Emily Sherwin, *Arbitration's Summer Soldiers: An Empirical Study of Arbitration Clauses in Consumer and Nonconsumer Cases*, 41 U. Mich. J.L. Reform 871 (2008) 9

J. Maria Glover, *Beyond Unconscionability: Class Action Waivers and Mandatory Arbitration Agreements*, 59 Vand. L. Rev. 1735 (2006) 7

Alan Scott Rau, *Arbitral Power and the Limits of Contract: The New Trilogy*, 22 Am. Rev. Int'l Arb. 435 (2011) 9

William G. Whitehill, *Class Actions and Arbitration Murky Waters: Stolt-Nielsen S.A. v. AnimalFeeds International Corp.*, 4 World Arb. & Mediation Rev. 1 (2010) 9

INTEREST OF AMICUS CURIAE

Amicus curiae New England Legal Foundation ("NELF") seeks to present its views, and the views of its supporters, on the question presented in this case: In an arbitration agreement falling under the Federal Arbitration Act, 9 U.S.C. §§ 1-16 ("FAA"), does a reference to state law with respect to the enforceability of a class arbitration waiver displace the FAA's mandate to enforce such a waiver?[1]

NELF is a nonprofit, nonpartisan, public interest law firm, incorporated in Massachusetts in 1977, and headquartered in Boston. Its membership consists of corporations, law firms, individuals, and others who believe in NELF's mission of promoting balanced economic growth in New England, protecting the free enterprise system, and defending economic rights. NELF's members and supporters include both large and small businesses located primarily in the New England region.

Amicus is committed to enforcing arbitration agreements according to their terms, and to

---

[1] Pursuant to Supreme Court Rule 37.6, amicus states that no counsel for a party authored this brief in whole or in part, and no person or entity, other than amicus, made a monetary contribution to the preparation or submission of the brief.

Pursuant to Supreme Court Rule 37.3(a), amicus also states that counsel of record for the petitioner and for the respondent have filed with the Court their respective blanket consent letters, consenting to the filing of amicus curiae briefs in support of either or neither party.

encouraging the arbitration of individual disputes as a viable alternative to litigation in court. NELF is also committed to upholding the supremacy of federal law over conflicting state law. In this case, amicus is committed to holding state courts accountable to the Federal Arbitration Act, 9 U.S.C. §§ 1-16 ("FAA"), which preempts any state law or rule of decision that interferes with "[t]he overarching purpose of the FAA to ensure the enforcement of arbitration agreements according to their terms so as to facilitate streamlined proceedings." *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1748 (2011). In particular, NELF is committed to enforcing the FAA's mandate that class arbitration waivers should be enforced, notwithstanding any state law to the contrary.

In addition to this amicus brief, NELF has filed many other related amicus briefs in this Court, arguing for the enforcement of arbitration agreements according to their plain terms under the FAA.[2]

For these and other reasons discussed below, NELF believes that its brief will assist the Court in deciding the issue presented in this case.

SUMMARY OF ARGUMENT

In the 2007 arbitration agreement at issue here, a reference to state law with respect to the

---

[2] *See Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304 (2013); *Oxford Health Plans LLC v. Sutter*, 133 S. Ct. 2064 (2013); *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011); *Hall St. Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576 (2008); *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444 (2003).

enforceability of a class arbitration waiver does not displace the Federal Arbitration Act's mandate to enforce such a waiver. The reference to "the law of your state" in the 2007 agreement's jettison clause was not *intended* to displace the application of the FAA to the class arbitration waiver. Quite to the contrary, this language actually indicates an intent to comply with the FAA, as it was generally understood in 2007. The agreement antedates *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011), at a time when the FAA's saving clause was widely misinterpreted as allowing "the law of your state" to decide whether a class arbitration waiver was enforceable, typically via the general contract defense of unconscionability. And so, compliance with the FAA in 2007 was understood as requiring compliance with a state's generally applicable contract law on the issue of class action waivers.

The 2007 agreement clearly reflects this pre-*Concepcion* assumption that the FAA allowed state contract law to decide the validity of a class waiver. Indeed, the jettison clause begins with the assumption that state law applies to the issue: "If, however, the law of your state would find this agreement to dispense with class arbitration procedures unenforceable " This is not a choice-of-law clause. It does not recite that state law shall apply to the class waiver, let alone recite that state law shall apply to the exclusion of federal law. Instead, the clause treats the applicability of state law to the class waiver as a given, consistent with the pre-*Concepcion* view of the FAA.

The real purpose of the jettison clause was to address the perceived *consequences*, in 2007, if applicable state law were to invalidate the class waiver: " then this entire [arbitration agreement] is unenforceable." The purpose of the jettison clause, then, was not to displace the FAA but instead to protect DIRECTV from the perceived risk of mandatory class arbitration at the time.

Since "the law of your state" was not intended to oust the FAA, and since "the law of your state" cannot, after *Concepcion*, obstruct the enforcement of a class arbitration waiver, DIRECTV's motion to compel the arbitration of Imburgia's individual claims should be allowed.

ARGUMENT

THE PRE-*CONCEPCION* ARBITRATION AGREEMENT AT ISSUE DOES NOT INDICATE AN INTENT TO DISPLACE THE FEDERAL ARBITRATION ACT BECAUSE THE FAA WAS UNDERSTOOD AT THAT TIME TO DEFER TO STATE CONTRACT LAW ON THE ISSUE OF CLASS ARBITRATION WAIVERS.

At issue is whether, in a 2007 arbitration agreement falling under the Federal Arbitration Act, 9 U.S.C. §§ 1-16 ("FAA"), a reference to state law with respect to the enforceability of a class arbitration waiver displaces the FAA's mandate to enforce such a waiver. Did the parties to the disputed agreement intend to elevate state law over the FAA on the subject of class arbitration waivers? The answer to this question is no, as amicus argues in detail below.

The arbitration provision at issue is contained within satellite television provider DIRECTV's 2007 customer agreement with Amy Imburgia. *Imburgia v. DIRECTV, Inc.*, 170 Cal. Rptr. 3d 190, 193 (Cal. Ct. App. 2014). The agreement requires the binding arbitration of any future disputes and prohibits classwide procedures. *Id.*[3] While the agreement recites that its arbitration provision "shall be governed by the Federal Arbitration Act," *id.*, it also indicates that enforcement of the class waiver will depend on the law of each customer's state: "If, however, *the law of your state* would find this agreement to dispense with class arbitration procedures unenforceable, then this entire [arbitration agreement] is unenforceable." *Id.* (emphasis added).

The California Court of Appeal interpreted "the law of your state" as referring to the law of California to the exclusion of federal law. *See Imburgia*, 170 Cal. Rptr. 3d at 195-98. That is, the lower court interpreted this contractual language, from 2007, to oust the FAA's mandate to enforce the class arbitration waiver, as announced four years later in *AT&T Mobility LLC v. Concepcion*, 131 S.

---

[3] The 2007 agreement provides, in relevant part:

> [A]ny Claim either of us asserts will be resolved only by binding arbitration. . Neither you nor we shall be entitled to join or consolidate claims in arbitration by or against other individuals or entities, or arbitrate any claim as a representative member of a class or in a private attorney general capacity.

Imburgia, 170 Cal. Rptr. at 193.

Ct. 1740 (2011). Accordingly, the lower court invalidated the class arbitration waiver under a provision of California law that bars individuals from waiving their right to pursue a class action for consumer-related claims. *See Imburgia,* 170 Cal. Rptr. 3d at 194. Consequently, the lower court gave effect to the agreement's nonseverability or jettison clause, quoted above, and voided the entire arbitration agreement. As a result, the court denied DIRECTV's motion to compel the arbitration of Imburgia's individual claims. *See id.* at 198.

The lower court misinterpreted the reference to "the law of your state" in the 2007 agreement's jettison clause. This contractual language was hardly intended to displace application of the FAA to the class arbitration waiver. Quite to the contrary, this language actually indicates an intent to *comply* with the FAA, as it was generally understood at the time. The agreement antedates *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011), at a time when the FAA's saving clause[4] was widely misinterpreted as allowing "the law of your state" to decide whether a class arbitration waiver was enforceable, typically via the general contract defense of unconscionability.[5] And so, compliance with the

---

[4] Under the FAA's saving clause, courts may invalidate arbitration agreements "upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. "This saving clause permits agreements to arbitrate to be invalidated by generally applicable contract defenses, such as fraud, duress, or unconscionability " *Concepcion*, 131 S. Ct. at 1746 (citation and internal quotation marks omitted).

[5] *See, e.g., Shroyer v. New Cingular Wireless Servs., Inc.*, 498 F.3d 976, 987 (9th Cir. 2007) ("The Federal Arbitration Act

FAA in 2007 was understood as requiring compliance with a state's generally applicable contract law on the issue of class action waivers.

Accordingly, reference to both the FAA and "the law of your state" in the 2007 agreement is entirely consistent with the dominant pre-

---

does not bar federal or state courts from applying generally applicable state contract law principles and refusing to enforce an unconscionable class action waiver in an arbitration clause."); *Ting v. AT&T*, 319 F.3d 1126, 1150 (9th Cir. 2003) ("Because unconscionability is a generally applicable contract defense, it may be applied to invalidate an arbitration agreement without contravening § 2 of the FAA."); *Scott v. Cingular Wireless*, 161 P.3d 1000, 1008 (Wash. 2007) ("Congress [in § 2 of the FAA] simply requires us to put arbitration clauses on the *same* footing as other contracts, not make them the special favorites of the law. . . [C]ontracts that effectively exculpate their drafter from liability under [state consumer protection law] for broad categories of liability are not enforceable in Washington, even if they are embedded in an arbitration clause. The arbitration clause is irrelevant to the unconscionability."); *Kinkel v. Cingular Wireless LLC*, 857 N.E.2d 250, 263 (Ill. 2006) ("[T]he FAA neither expressly nor impliedly preempts a state court from holding that an arbitration clause or a specific provision within an arbitration clause is unenforceable[.] Because our analysis on the question of class action waivers is applicable to all contracts governed by Illinois law, it can be applied to render the class action waiver in an arbitration clause unenforceable without undermining the goals and policies of the FAA."); J. Maria Glover, *Beyond Unconscionability: Class Action Waivers and Mandatory Arbitration Agreements*, 59 Vand. L. Rev. 1735, 1751 (2006) ("[D]ue to this 'saving clause,' federal law favors enforcement of [arbitration] agreements according to their terms insofar as--but only insofar as--those terms are enforceable as a matter of generally applicable state contract law. [T]he unconscionability doctrine remains a potential sword with which to attack class action waivers.").

Concepcion view that the FAA allowed state law to decide whether a class arbitration was enforceable. Indeed, the jettison clause begins with the *assumption* that state law determines the validity of the class waiver: "If, however, the law of your state would find this agreement to dispense with class arbitration procedures unenforceable ." *Imburgia*, 170 Cal. Rptr. at 193. This is not a choice-of-law clause. It does not recite that state law shall apply to the class waiver, let alone recite that state law shall apply to the exclusion of federal law. Instead, the clause treats the applicability of state law as a given, consistent with the pre-*Concepcion* view of the FAA.

The real purpose of the jettison clause was to address the perceived *consequences*, in 2007, if applicable state law were to invalidate the class waiver: " then this entire [arbitration agreement] is unenforceable." *Imburgia*, 170 Cal. Rptr. at 193. The purpose of the jettison clause, then, was not to displace the FAA but instead to protect DIRECTV from the perceived risk of mandatory class arbitration at the time.[6]

---

[6] *See* Christopher R. Drahozal & Quentin R. Wittrock, *Franchising, Arbitration, and the Future of the Class Action*, 3 Entrepreneurial Bus. L.J. 275, 278 (2009) ("As long as the invalid [class arbitration] waiver is severable from the parties' arbitration agreement, the case will still proceed in arbitration --but on a class basis rather than an individual basis. However, an increasing number of . form contracts now include nonseverability provisions in their arbitration clauses, specifying by contract that if the class arbitration waiver is held invalid, the entire arbitration clause is unenforceable. The result of such a clause, in those jurisdictions holding class arbitration waivers invalid, is that any class claim within the scope of the arbitration clause would proceed as a putative

Concepcion, of course, has since rejected the basic assumption of this 2007 jettison clause that the FAA allows state law to decide whether a class

---

class action in court."); Theodore Eisenberg, Geoffrey P. Miller & Emily Sherwin, *Arbitration's Summer Soldiers: An Empirical Study of Arbitration Clauses in Consumer and Nonconsumer Cases*, 41 U. Mich. J.L. Reform 871, 884 (2008) ("[I]n 60 percent of the consumer contracts that contained mandatory arbitration clauses, companies' standard form contracts deemed those clauses void if the arbitration process allows for class action activity.").

This erroneous belief in mandatory class arbitration was perhaps due to a widespread misinterpretation of *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444 (2003) (plurality opinion), which the Court later addressed and corrected in *Stolt–Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 680-81 (2010). According to that misreading, *Bazzle* had recognized an implied right to class arbitration in any arbitration agreement governed by the FAA, which the drafting party would need to overcome with express contract language forbidding class arbitration. *See Stolt–Nielsen*, 559 U.S. at 680-81 (discussing same). *See also* William G. Whitehill, *Class Actions and Arbitration Murky Waters: Stolt-Nielsen S.A. v. AnimalFeeds International Corp.*, 4 World Arb. & Mediation Rev. 1, 9-10 (2010), *available* at http://www.gardere.com/Binaries/Press%20and%20Publications/WAMRWhitehill.pdf (last visited June 5, 2015) (same); Alan Scott Rau, *Arbitral Power and the Limits of Contract: The New Trilogy*, 22 Am. Rev. Int'l Arb. 435, 524-25 (2011) (same).

Therefore, if a class waiver were invalidated under state contract law, pre-*Concepcion*, a claimant's purported presumptive right to class arbitration that was misattributed to *Bazzle* might remain undisturbed and intact in the remaining terms of the arbitration agreement. Without a jettison clause, then, the drafting party could face the undesirable prospect of mandatory class arbitration if the class waiver were invalidated under a state's general contract law, or so it was believed back then.

arbitration waiver is enforceable. In *Concepcion*, the Court held that the FAA requires the enforcement of a class arbitration waiver that is contained in a valid arbitration agreement, notwithstanding any state law to the contrary. *See Concepcion*, 131 S. Ct. at 1748.[7] After *Concepcion*, then, it is clear that "the law of your state" has no effect on the enforcement of such a waiver. Therefore, the disputed "law of your state" language in this 2007 agreement is now a meaningless artifact from the pre-*Concepcion* era.[8]

In sum, the reference to "the law of your state" in the 2007 agreement was not intended to oust the FAA. To the contrary, this contractual language actually indicates compliance with the FAA as it was

---

[7] "Although [the FAA's] saving clause preserves generally applicable contract defenses, nothing in it suggests an intent to preserve state-law rules that stand as an obstacle to the accomplishment of the FAA's objectives." *Concepcion*, 131 S. Ct. at 1748. That is, invalidating a class waiver, even under a generally applicable contract defense, would *require* class arbitration as a condition for the enforcement of the arbitration agreement. And requiring class arbitration would, in turn, contravene "[t]he overarching purpose of the FAA . . . to ensure the enforcement of arbitration agreements according to their terms so as to facilitate streamlined proceedings." *Id. See also id.* ("Requiring the availability of classwide arbitration interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA.").

[8] In addition to *Concepcion*, *Stolt–Nielsen* has also obviated the need for a jettison clause in an agreement governed by the FAA. Under *Stolt-Nielsen*, there is no implied right to class arbitration. *See Stolt-Nielsen*, 559 U.S. at 685. Instead, the FAA requires a contractual basis that the parties consented to class arbitration. *See id.* at 684. A class arbitration waiver clearly defeats any contractual basis authorizing class arbitration.

understood at the time. The wording merely acknowledges that the law of each customer's state would determine the validity of the class arbitration waiver at the time. Since "the law of your state" was not intended to supplant the FAA, and since "the law of your state" cannot, after *Concepcion*, obstruct the enforcement of a class waiver, DIRECTV's motion to compel the arbitration of Imburgia's individual claims should be allowed.

CONCLUSION

For the reasons stated above, amicus respectfully requests that this Court reverse the judgment of the Court of Appeal of California.

Respectfully submitted,

NEW ENGLAND LEGAL FOUNDATION,

By its attorneys,

Benjamin G. Robbins
Counsel of Record
Martin J. Newhouse, President
New England Legal Foundation
150 Lincoln Street
Boston, Massachusetts 02111-2504
Telephone: (617) 695-3660
benrobbins@nelfonline.org

June 5, 2015